# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1937

## No. 596

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, ET AL., PETITIONERS,

*vs.*

NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1937.

CERTIORARI GRANTED JANUARY 3, 1938.

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PETITIONER,

*vs.*

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1938.

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[fol. 1]

# IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

## Docket Entries

Feb. 14, 1935. Bill of complaint filed.

Feb. 14, 1935. Subpoena issued.

Feb. 14, 1935. Order of court filed & entered permitting plaintiff to pay into the registry of the court the sum of $1045.42; defendants are restrained from instituting any action against plaintiff; rule granted to show cause why temporary restraining order should not be continued and a preliminary injunction issue; rule returnable Feb. 23, 1935; plaintiff to file bond in the sum of $1,000.00.

Feb. 18, 1935. Bond of New York Life Insurance Co. filed by leave of court.

Feb. 19, 1935. Acceptance of service of bill of complaint and order filed by defendants.

Feb. 23, 1935. Order of court filed & entered making rule absolute and the defendants are enjoined from proceeding with any action including the action at No. 353 Jan. Term 1935 in the Court of Common Pleas of Jefferson County on account of the policies of insurance or from transferring said policies.

Feb. 25, 1935. On motion of defendant order entered striking off decree of February 23, 1935 and extending return day of rule to March 2, 1935.

Feb. 25, 1935. Praecipe for appearance de bene esse of Margiotti, Pugliese, Evans & Reid for defendants, filed.

[fol. 2] Mar. 2, 1935. Motion to dismiss bill of complaint filed by defendant.

Mar. 2, 1935. Motion to dissolve temporary injunction filed by defendant.

Mar. 4, 1935. Subpoena returned not served.

Apr. 13, 1935. Opinion on defendants' motion to dismiss bill of complaint and to dissolve temporary order filed and order entered directing that both motions will be denied; orders may be submitted accordingly.

Apr. 16, 1935. Order of court filed & entered overruling defendants' motion to dismiss bill of complaint and to dissolve temporary injunction; rule granted Feb. 14, 1935 is hereby made absolute; defts. are enjoined from in-

stituting any proceedings; defendants have 15 days to answer; exception noted to defendants and bill sealed.

Apr. 24, 1935. On petition of defendants, order entered allowing appeal to act as supersedeas.

Apr. 24, 1935. Citation issued returnable May 24, 1935.

Apr. 24, 1935. Assignment of errors filed.

May 10, 1935. Supersedeas and cost bond filed by order of court.

Sept. 26, 1935. Praecipe for transcript of record.

Sept. 26, 1935. Statement of evidence under Equity rule 75 filed.

[fol. 3] Sept. 27, 1935. Notice to counsel under Equity rule 75 (b) filed with acceptance of service thereon.

Sept. 28, 1935. Order made on original statement of evidence under Equity rule 75 approving same.

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IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed February 14, 1935

To the Honorable the Judges of said Court:

Your orator, the New York Life Insurance Company, respectfully represents as follows:

1. Plaintiff is a mutual life insurance company incorporated under the laws of the State of New York and is a citizen of said state. The plaintiff is lawfully engaged in business in the City of Pittsburgh in the Western District of the Commonwealth of Pennsylvania. The defendants are temporarily living in McCoysville, Pennsylvania, but where their legal residence is the plaintiff does not know. The defendant John G. Ruhlin has, however, brought an action of assumpsit against the New York Life Insurance Company at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, Which is within the Western District of said Commonwealth.

2. The amount in controversy in this case exceeds the sum of $3,000, exclusive of interest and costs.

3. On December 1, 1928, the plaintiff wrote its policy of life insurance No. 10,452,365 in the face amount of $10,000, [fol. 4] and its policy No. 10,452,366 in the face amount of $5,000 on the life of the aforesaid John G. Ruhlin. The

defendant Jennie B. Ruhlin is the wife of said John G. Ruhlin and is the beneficiary of the trust to be set up out of the proceeds of said two policies, with certain limitations over in case of her death before the whole fund has been paid to her. A true and correct copy of each of said policies, marked, respectively, Exhibits "A" and "B", is attached hereto and made a part hereof.

4. As a prerequisite to the issuance by the plaintiff of the aforesaid two policies No. 10,452,365 and No. 10,452,366, said John G. Ruhlin made and signed an application to the plaintiff for such insurance. As a part of said application said John G. Ruhlin on November 28, 1928, made answers to the plaintiff's medical examiner to questions contained in Part II of the application and signed said Part II of the application. A true and correct copy of said application both Parts I and II, is attached to and made a part of each of said policies. The answers contained therein are the correctly recorded answers made to the respective questions by said John G. Ruhlin. Included in the questions propounded to and answers made by said John G. Ruhlin are the following:

"8. Have you consulted a physician for or suffered from any ailment or disease of B. The Heart, Blood Vessels or Lungs? No.

10. Have you consulted a physician for any ailment or disease not included in your above answers? No.

[fol. 5] 11. What physician or physicians, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

5. In his answers to the questions prior to No. 10 quoted in the preceding paragraph, said John G. Ruhlin named no physician whatever and no ailment or disease, except a herniotomy in 1912 with a good recovery.

6. Also in said application, John G. Ruhlin above his signature stated:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree

that the Company believing them to be true shall rely and act upon them."

7. On July 7, 1930, the plaintiff wrote its three policies of life insurance No. 11,165,728, No. 11,165,729 and No. 11,165,730, each in the face amount of $4,000, on the life of said John G. Ruhlin. The defendants Jennie B. Ruhlin and John B. Ruhlin, a son of said John G. Ruhlin, are the beneficiaries of a trust to be created by the proceeds of policy No. 11,165,728. The defendants Jennie B. Ruhlin and William R. Ruhlin, another son of said John G. Ruhlin, are the beneficiaries of a trust to be created by the proceeds [fol. 6] of policy No. 11,165,729. The defendants Jennie B. Ruhlin and Jean L. Ruhlin, a daughter of said John G. Ruhlin, are the beneficiaries of a trust to be created by the proceeds of policy No. 11,165,730. A true and correct copy of each of said three policies, marked, respectively, Exhibits "C", "D" and "E", together with the trust agreement applicable to each, is attached hereto and made a part hereof.

8. As a prerequisite to the issuance by the plaintiff of the aforesaid three policies No. 11,165,728, No. 11,165,729 and No. 11,165,730, said John G. Ruhlin made and signed an application to the plaintiff for such insurance. As a part of said application, said John G. Ruhlin on June 26, 1930, made answers to the plaintiff's medical examiner to questions contained in Part II of the application and signed said Part II of the application. A true and correct copy of said application, both Parts I and II, is attached to and made a part of each policy. The answers appearing in said application to the questions contained therein are the correctly recorded answers made to the respective questions by said John G. Ruhlin. Included in the questions propounded to and answers made by said John G. Ruhlin are the following:

"8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of B. The Heart, Blood Vessels or Lungs? No.

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No.

[fol. 7] 11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

9. In his answers to the questions prior to No. 10 quoted in the preceding paragraph, said John G. Ruhlin named no physician or practitioner whatever and no ailment or disease, except a herniotomy in 1912 with good results.

10. Also in said application, John G. Ruhlin above his signature stated:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them."

11. In fact the aforesaid answers of John G. Ruhlin to questions in Part II of the applications made on November 28, 1928, and on June 26, 1930, were false. Said John G. Ruhlin had before November 28, 1928, consulted a physician or practitioner for and had suffered from an ailment or disease of the heart; had consulted a physician or practitioner for an ailment or disease not included in any of his answers and had consulted or been examined or treated by various physicians or practitioners within the five years immediately preceding November 28, 1928, and June 26, [fol. 8] 1930. From November 3, , until about 1927, said John G. Ruhlin consulted, was examined and was treated by Dr. Frank A. Lorenzo for heart trouble, aortic insufficiency, myocarditis and a decompensating heart.

12. The aforesaid questions and answers were material to the risk and if said questions had been answered truthfully the plaintiff would not have issued any of said policies. The plaintiff in approving said John G. Ruhlin's applications and issuing the aforesaid policies believed the above-quoted answers of said John G. Ruhlin to be full, complete and true and relied and acted upon them.

13. The above-quoted answers of John G. Ruhlin to questions in Part II of the applications were made by him with knowledge of their falsity and fraudulently for the purpose of securing said insurance.

14. On November 1, 1934, said John G. Ruhlin presented to the plaintiff a claim for total and permanent disability

benefits under each of said five policies. The cause for said alleged total and permanent disability is heart trouble.

15. The plaintiff did not know or have any reason to learn of said fraudulent misrepresentations by which said policies were procured from it until after said claim for disability benefits was presented on November 1, 1934, whereupon it conducted an investigation which disclosed the facts hereinbefore set forth regarding the prior medical history of said John G. Ruhlin. On December 28, 1934, the plaintiff [fol. 9] notified the defendants John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin that because of the aforesaid misrepresentations it elected to rescind the disability and double indemnity benefits provisions of each of said five policies. Also on December 28, 1934, the plaintiff tendered to said John G. Ruhlin the sum of $1,045.42, being the aggregate amount of the premiums paid for said disability and double indemnity benefits, with interest thereon from the dates of receipt to the date of said tender, and also offered to do whatever else, if anything, it ought to do for the purpose of such rescission. Said tender was refused by said John G. Ruhlin. The plaintiff has always since December 28, 1934, been ready and willing and is now ready and willing to refund all of said premiums, together with interest thereon, and simultaneously with the filing of this bill of complaint will pay into this Court said sum of $1,045.42, and offers to do whatever else, if anything, it ought in equity to do for the purpose of reforming said policies by deleting therefrom the disability and double indemnity provisions and restoring the status quo.

16. Said John G. Ruhlin is still alive. No statement of claim has been served upon the New York Life Insurance Company or its counsel in the aforesaid action at law brought against it in the Court of Common Pleas of Jefferson County, Pennsylvania, by said John G. Ruhlin, and the plaintiff herein cannot, therefore, tell what said action is for. The defendants Jennie B. Ruhlin, John B. Ruhlin, [fol. 10] William R. Ruhlin and Jean L. Ruhlin are not parties to said action in the Court of Common Pleas of Jefferson County. No opportunity, therefore, has been afforded or is likely to be afforded the plaintiff to contest its liability under the disability and double indemnity provisions of said policies, or any of them, in any action or

proceeding at law or in equity, and particularly to set up the said fraudulent misrepresentations by which it was induced to issue said policies unless this Court entertains this suit.

Wherefore your orator is without an adequate remedy at law, is in need of such relief as can be granted only by a court of equity and unless afforded equitable relief will suffer immediate and irreparable damage. Your orator, therefore, prays your Honorable Court as follows:

(1) That the defendants be required to make full, specific and direct answers to this bill of complaint.

(2) That if any of the defendants originally named herein be minors a guardian ad litem be appointed for them by this Court and such guardian be added as a party defendant.

(3) That this Court order and decree the reformation of each of the five policies of insurance mentioned in the bill of complaint by deleting and eliminating therefrom the disability and double indemnity provisions therein contained and that said disability and double indemnity provisions be declared rescinded and void.

[fol. 11] (4) That the semi-annual premiums for policy No. 10,452,365 be reduced to $184. That the quarterly premiums for policy No. 10,452,366 be reduced to $46.90 and that the semi-annual premiums for each of the three policies numbered 11,165,728, 11,165,729 and 11,165,730 be reduced to $95.88.

(5) That pending the final disposition of this bill the defendants, their attorneys, and all other persons or parties whatsoever, be enjoined from instituting or prosecuting any action or proceeding, legal or equitable, against the New York Life Insurance Company by reason of or based upon any or all of said policies of insurance, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania.

(6) That pending the final disposition of this bill the defendants be restrained and enjoined from assigning said policies of insurance, or any of them, or any rights thereunder, or from changing the beneficiary or any thereof.

(7) That a writ of subpœna of the United States of America be directed to the defendants and the guardian

ad litem, if one be appointed for any minor defendants, commanding them on a day certain to appear and answer this bill of complaint and abide by and perform such orders and decrees in the premises as to this Court shall seem proper and be required by the principles of equity and good conscience.

(8) That your Honorable Court grant such other and further relief not herein specifically prayed for as the na-
[fol. 12] ture of the case may require and as to it may seem meet.

New York Life Insurance Company, by William F. Rohlefs. Smith, Buchanan, Scott & Gordon, Solicitors for Plaintiff.

*Duly sworn to by Wm. F. Rohlefs. Jurat omitted in printing.*

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[fol. 13] EXHIBIT "A" TO BILL OF COMPLAINT

New York Life Insurance Company

A Mutual Company

Agrees to Pay

to Jennie B., wife of the insured, * * * (with right on the part of the Insured to change the Beneficiary in the manner provided herein) * * * Beneficiary (the face of this policy) * * * Ten Thousand * * * Dollars upon receipt of due proof of the death of * * * John G. Ruhlin * * * the Insured, or (double the face of this policy) * * * Twenty Thousand * * * Dollars if such death resulted from accident as defined under "Double Indemnity" and subject to the provisions therein set forth.

And upon receipt of due proof that the Insured is totally and presumably permanently disabled before age 60, as defined under "Total and Permanent Disability",

The Company Agrees to Pay to the Insured * * * One Hundred * * * Dollars each month, and to waive payment of premiums, as provided therein.

This contract is made in consideration of the application therefor and of the payment in advance of the sum of $208.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for

the period terminating on the Twenty-eighth day of May Nineteen Hundred and Twenty-nine, and of a like sum on said date and every Six calendar months thereafter during the life of the Insured.

[fol. 14] (The above premium includes $5.20 for the Double Indemnity Benefit and $19.30 for the Disability Benefits.)

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the Twenty-eighth day of November Nineteen Hundred and Twenty-eight, which day is the anniversary of the Policy.

The Benefits and Provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this First day of December Nineteen Hundred and Twenty-eight.

Darwin P. Kingsley, President. Frederick M. Johnson, Secretary. ——— Registrar.

Age 42.
Examined HG.
AS EM.

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium [fol. 15] Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

Double Indemnity

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an as-

sault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or, directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends". [fol. 16] Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit.

## Total and Permanent Disability

Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this Policy took effect and before the anniversary of the Policy on which the Insured's age at nearest birthday is sixty.

Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the [fol. 17] mode of payment in effect when disability occurred.

(b) Income Payments.—The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face of this Policy) for each completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured.

In event of default in payment of premium after the Insured has become totally disabled as above defined, the Policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default.

The total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot shall constitute total disability for life.

Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, [fol. 18] or if the Insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

The sum payable in any settlement of the Policy shall not be reduced by income payments made nor by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. Any disability benefit due but unpaid at the time of the Insured's death shall be payable to the person entitled to the proceeds of the Policy.

Disability Benefits shall not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war; nor shall these benefits apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends".

Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is sixty, will be reduced by the amount of premium charged for Disability Benefits. Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for Disability Benefits.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of [fol. 19] premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits.

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IN UNITED STATES DISTRICT COURT

ORDER RESTRAINING DEFENDANTS, ETC.

Now, to-wit, February 14, 1935, the Court having examined the bill of complaint filed in the above entitled case, and after due consideration and upon motion of counsel for the plaintiff, it is ordered, adjudged and decreed as follows:

1. That the plaintiff be permitted to pay into the registry of this Court the sum of $1,045.42 offered to be refunded in said bill.

2. That the defendants be and they hereby are required to answer fully, specifically and directly the averments set forth in said bill of complaint, said answers to be filed within twenty days from the date of service of said bill upon said defendants.

3. That the defendants, their heirs, executors, administrators and assigns, their attorneys and all other persons, be and they hereby are temporarily restrained from instituting any action or proceeding, legal or equitable, against the plaintiff or from proceeding in any way whatsoever with any action or suit which may have been instituted by them or any of them prior to the filing of this bill of complaint, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, upon or in anywise on account [fol. 20] of the policies of insurance referred to in the bill

of complaint filed in this case; or from assigning or transferring any rights under said policies or changing the beneficiary or beneficiaries thereof; and that a rule to show cause why this temporary restraining order should not be continued and a preliminary injunction of like tenor issued, be and it hereby is granted against the defendants, returnable February 23, 1935; bond to be approved by this Court to be given by the plaintiff in the sum of $1000.00.

4. That a subpœna be issued to be served upon each and all of the defendants.

Per Curiam, S.

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IN UNITED STATES DISTRICT COURT

ORDER MAKING RULE ABSOLUTE

Now, to-wit, February 23, 1935, the return date of the rule heretofore granted in the above entitled case on February 14, 1935, having arrived, after due consideration and upon motion of counsel for the plaintiff, it is ordered, adjudged and decreed that said rule be and it hereby is made absolute and the defendants, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, their heirs, executors, administrators and assigns, their attorneys and all other persons or parties whatsoever, are enjoined, pending the final determination of this suit, from instituting any action or proceeding, legal or equitable, against the plaintiff or from proceeding in any way whatsoever with any action or suit which may have been instituted [fol. 21] by them or any of them prior to the filing of the above entitled suit, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, upon or in anywise on account of the policies of insurance referred to in the bill of complaint filed in this case; or from assigning or transferring any rights under said policies or changing the beneficiary or beneficiaries thereof; the bond heretofore given by the plaintiff to stand pending the final determination of this suit.

Per Curiam, S.

IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY INJUNCTION—Filed March 2, 1935

And now, March 1, A. D. 1935, defendants, by their attorneys, Margiotti, Pugliese, Evans & Reid, who appear specially for the purposes of this Motion, moves the Court to dissolve the temporary injunction issued in the above stated case, and assigns therefor the following reasons:

First. Before the Bill in Equity in this case was filed, a suit involving substantially the same subject-matter was pending in the Court of Common Pleas of Jefferson County, Pennsylvania, in an action of assumpsit entered to No. 353 January Term, 1935, which said court is a court of competent, concurrent jurisdiction with this court, and which State Court has priority of jurisdiction.

[fol. 22] Second. The plaintiff in the action of assumpsit previously instituted in Jefferson County to No. 353 January Term, 1935, is John G. Ruhlin, the Insured in the contracts, copies of which are attached to the Bill of Complaint, and the other defendants above named are Jennie B. Ruhlin, wife of the Insured, and John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, children of said John G. Ruhlin, Insured, as shown in Plaintiff's Bill, said children being minors; which said wife and children as shown by the policies in suit, are all made Beneficiaries under the several policy contracts in suit in this court, and in the Court of Common Pleas of Jefferson County.

Third. This Court is without jurisdiction to grant an Injunction to stay proceedings in the said State Court, under the provisions of section 265 of the Judicial Code (28 U. S. C. A. sec. 379).

Fourth. The plaintiff has a plain, adequate and complete remedy at law.

Fifth. This Court is without jurisdiction to deprive the defendant, John G. Ruhlin, *John G. Ruhlin*, of his right to trial by jury.

Sixth. No cause for equitable relief is stated in the Bill of Complaint.

Seventh. That the policies in suit according to their respective terms are each incontestable after two years from its respective date of issue "except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

[fol. 23] Eighth. That the provisions and conditions contained in each policy respectively as to Disability Benefits, are as follows:

"Disability Benefits shall not apply if the disability shall result from self-inflicted injury or from military or naval service in time of war, or from engaging as a passenger or otherwise in aviation or aeronautics; nor shall these benefits apply to the Temporary Insurance or to the Paid-Up Insurance provided here under 'Surrender Values', or to any Dividend Additions provided under 'Participation in Surplus-Dividends'."

Ninth. That the provisions and conditions as to Double Indemnity in each of said policies, are as follows:

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury."

Tenth. That the only ground set up in the Bill in this case, upon which reformation of the policies in suit is asked, [fol. 24] are alleged false answers made in the application for insurance as to each respective policy.

Eleventh. That John G. Ruhlin, the Insured, became totally and permanently disabled in August, 1934.

Twelfth. That in November, 1934, John G. Ruhlin, the Insured, made application to plaintiff for Disability Benefits under the five policies of insurance in suit; that in the latter part of December, 1934, the plaintiff company refused

to pay the Disability Benefits under the said five policies in accordance with said contracts and attempted to rescind the Disability and Double Indemnity Benefits, and tendered back premiums covering Disability and Double Indemnity, which tender was refused by said John G. Ruhlin; and on the 19th day of January, 1935, the said John G. Ruhlin instituted his action of assumpsit in the Court of Common Pleas of Jefferson County to No. 353 January Term, 1935, to recover the Disability Benefits under the said five contracts in suit due and owing thereunder.

Thirteenth. That the Bill upon its face shows no ground warranting the issuance by the Court of a temporary injunction.

Margiotti, Pugliese, Evans & Reid, Attorneys for Defendants.

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[fol. 25] In United States District Court

Statement of Evidence Under Equity Rule 75—Filed September 26, 1935

Be it remembered that the above entitled cause came on regularly for trial before the above Court sitting in equity on the 2nd day of March, A. D. 1935, on the Bill of Complaint, praying, inter alia, for a preliminary injunction, Rule to Show Cause, and Motion to Dissolve; Messrs. Smith, Buchanan, Scott & Gordon, by William H. Eckert, Esq., appearing as counsel for plaintiff, and Messrs. Margiotti, Pugliese, Evans & Reid, by S. C. Pugliese, Esq. and John E. Evans, Sr., Esq., appearing as counsel for defendants, d. b. e.

The Court stated that he would consider the allegations of the Bill of Complaint as the reasons urged by plaintiff for the Injunction.

Attorneys for defendants offered in evidence, and called particular attention to paragraph one of the Bill of Complaint, alleging, inter alia: "The defendant John G. Ruhlin has, however, brought an action of assumpsit against the New York Life Insurance Company at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, which is within the Western District of said Commonwealth."

The above and foregoing is all the evidence introduced at the trial of the said cause and all proceedings had in the trial thereof.

[fol. 26] Wherefore, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, defendants and appellants, pray that the above statement of evidence be settled, approved and allowed by the above-entitled Court as a true, full, correct and complete statement of the evidence taken and given on the trial of said cause, for use on the Appeal taken to the United States Circuit Court of Appeals for the Third Circuit.

Dated September 24, A. D. 1935.

Margiotti, Pugliese, Evans & Reid, Sebastian C. Pugliese, John E. Evans, Sr., Attorneys for Defendants-Appellants.

Service of a copy of the foregoing Statement of Evidence is hereby accepted this 26th day of September, A. D. 1935.

Smith, Buchanan, Scott & Gordon, Attorneys for Plaintiff-Appellee.

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IN UNITED STATES DISTRICT COURT

ORDER SETTLING STATEMENT OF EVIDENCE

And now, September 28, A. D. 1935, the foregoing Statement of Evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above-entitled action.

F. P. Schoonmaker, United States District Judge,
Per Gibson, J.

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[fol. 27] IN UNITED STATES DISTRICT COURT

OPINION—Filed April 13, 1935

On Defendants' Motion: (1) To Dismiss Bill of Complaint; (2) To Dissolve Temporary Order Relative to Further Proceedings by Defendant John G. Ruhlin Against Plaintiff in Jefferson County Court of Common Pleas

SCHOONMAKER, J.:

The plaintiff sued in equity the defendants, who are respectively the insured and beneficiaries in five insurance

policies issued by the plaintiff on the life of John G. Ruhlin, for purpose of obtaining a decree cancelling and eliminating from said policies the provisions for the payment of double indemnity and disability benefits on the ground that the policies were procured by fraud on the part of the insured. The plaintiff also obtained a temporary restraining order restraining the defendant, John G. Ruhlin, from proceeding further pending the decision of the instant suit, with an action brought by him against the plaintiff in the Court of Common Pleas of Jefferson County, Pennsylvania, to recover disability benefits alleged to have accrued on these policies.

The defendants have moved to dismiss the bill of complaint, because it discloses no ground of equitable relief and have also moved to dissolve the temporary restraining order because the court was without power to make it.

The sole question raised on the motion to dismiss was whether the policy by the terms thereof had become incontestable.

[fol. 28] The clause of all five policies as to incontestability is as follows:

"Incontestability. This policy shall be incontestable after two years from its date except for nonpayment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

This suit was brought more than two years from the date of each policy involved.

Our opinion is that under this clause the double indemnity and disability benefit provisions of these policies are still open to contest. We rule this case on our opinion filed in New York Life Insurance Company vs. Davis, 5 Fed. Supp. 316.

As to the restraining order affecting the pending suit in Jefferson County, Pennsylvania, we hold that notwithstanding Section 265 of the Judicial Code, (Tit. 28, Sec. 379, U. S. C. A.), we have jurisdiction as an incident to this suit to restrain further prosecution of that suit until a decision of the issues involved in this case. In so doing, we follow our ruling, New York Life Ins. Co. vs. Davis, supra; New York Life Ins. Co. vs. Wingerter, 2978 Equity; New York Life Ins. Co. vs. Halpern, 47 Fed. (2) 935. This view has support in decisions in other courts. See Brown vs. Pacific

Mutual Life Ins. Co., 62 Fed. (2) 711; Jefferson Standard Life Ins. Co. vs. Keeton, 292 Fed. 53.

Both motions will be denied. Orders may be submitted accordingly.

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[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS, ETC.

Now, to-wit, April 16th, 1935, after argument by counsel and due consideration, in accordance with the opinion filed on April 13, 1935, it is ordered, adjudged and decreed that the defendants' motion to dismiss the bill of complaint and the defendants' motion to dissolve the temporary injunction be and they hereby are each overruled; that the rule heretofore granted in the above entitled cause on February 14, 1935, be and it hereby is made absolute; and that the defendants, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, their heirs, executors, administrators and assigns, their attorneys and all other persons or parties whatsoever, be and they hereby are enjoined, pending the final determination of this suit, from instituting any action or proceeding, legal or equitable, against the plaintiff, or from proceeding in any way whatsoever with any action or suit which may have been instituted by them or any of them prior to the filing of the above entitled suit upon or in anywise on account of the policies of insurance referred to in the bill of complaint in this case, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, or from assigning or transferring any rights under the disability or double indemnity provisions of said policies or changing the beneficiary or beneficiaries thereof; the bond heretofore given by the plaintiff to stand pending the final determination of this suit.

Defendants to have 15 days to answer.

Per Curiam, S.

[fol. 30] Eo die, exception noted to defendants and bill sealed.

F. P. Schoonmaker, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 24, 1935

To the Honorable F. P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsylvania:

John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, your petitioners, who are the defendants in the above entitled cause, pray that they may be permitted to take an appeal from the Order of Court entered in the above cause on the 16th day of April, A. D. 1935, to the United States Circuit Court of Appeals for the Third Circuit, for the reason specified in the Assignment of Errors which is filed herewith.

And your petitioners desire that said appeal shall operate as a supersedeas, and therefore pray that an Order be made fixing the amount of security which said John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals, and also that the time for filing an Answer to the [fol. 31] Bill of Complaint, should the same be required, be extended to fifteen days after the decision of the said Circuit Court.

Dated, April 18, A. D. 1935.

Margiotti, Pugliese, Evans & Reid, John E. Evans,
Attorneys for Defendant-Petitioner.

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IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The Petition of John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, defendants in the above-entitled cause, for an appeal from the Order of April 16, A. D. 1935, is hereby granted and the appeal is allowed; and upon petitioners filing a Bond in the sum of Five Hundred ($500.00) Dollars, with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the Order made and entered in

the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the United States Circuit Court of Appeals; and also the time for filing an Answer to the Bill of Complaint, should the same be required, is hereby extended to fifteen days after the decision of the said Circuit Court.

Dated, April 24, A. D. 1935.

F. P. Schoonmaker, District Judge.

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[fol. 32] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 24, 1935

And now, to-wit, this 18th day of April, A. D. 1935, come the said John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin, and Jean L. Rulin, defendants and appellants in the above-entitled cause, and file the following assignment of errors upon which they will rely in the prosecution of the Appeal herewith petitioned for in said cause from the Order of this Court entered on the 16th day of April, A. D. 1935:

1. The Court erred in granting the Order for an interlocutory injunction herein, said Order being as follows:

"Now, to-wit, April 16, 1935, after argument by counsel and due consideration, in accordance with the opinion filed on April 13, 1935, it is ordered, adjudged and decreed that the defendants' motion to dismiss the bill of complaint and the defendants' motion to dissolve the temporary injunction be and they hereby are each overruled; that the rule heretofore granted in the above entitled cause on February 14, 1935, be and it hereby is made absolute; and that the defendants, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, their heirs, executors, administrators and assigns, their attorneys and all other persons or parties whatsoever, be and they hereby are enjoined, pending the final determination of this suit, [fol. 33] from instituting any action or proceeding, legal or equitable, against the plaintiff, or from proceeding in any way whatsoever with any action or suit which may have been instituted by them or any of them prior to the filing of the above entitled suit upon or in any wise on account of the policies of insurance referred to in the bill of complaint

in this case, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, or from assigning or transferring any rights under the disability or double indemnity provisions of said policies or changing the beneficiary or beneficiaries thereof; the bond heretofore given by the plaintiff to stand pending the final determination of this suit.

Per Curiam, F.

Eo die, exception noted to defendants and bill sealed.

F. P. Schoonmaker, Judge."

Wherefore, defendants and appellants pray that the said Order may be reversed, and for such other and further relief as to the Court may seem just and proper.

Margiotti, Pugliese, Evans & Reid, Attorneys for Defendants-Appellants.

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[fol. 34] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed September 26, 1935

To the Clerk of the above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an Appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Docket Entries.
2. Bill of Complaint—omitting from Exhibit "A"—the policy—the following: all pages excepting the first page and page 2 "Double Indemnity" and "Total and Permanent Disability" and on Page 6 the Incontestability Clause; also omitting Exhibits "B", "C", "D" and "E".
3. Order of February 14, 1935.
4. Order of Court granting restraining Order.
5. Motion to Dissolve.
6. Statement of evidence.
7. Opinion re Motion.

8. Order re Motion.
9. Petition for Appeal and Supersedeas.
10. Order allowing Appeal and Supersedeas.
11. Assignment of Error.
12. This præcipe.
13. Clerk's Certificate.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Circuit Court of [fol. 35] Appeals for the Third Circuit, and to be filed in the office of the Clerk of the said Circuit Court at Philadelphia, Pa.

Dated, September 26th, A. D. 1935.

Margiotti, Pugliese, Evans & Reid, Sebastian C. Pugliese, John E. Evans, Sr., Attorneys for Appellants.

Service of the above Praecipe accepted and acknowledged this 26th day of September, A. D. 1935.

Smith, Buchanan, Scott & Gordon, Attorneys for Appellee.

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Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 36] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5939

John G. Rhulin et al., Appellants,

vs.

New York Life Insurance Co., Appellee

Order Assigning Hon. Albert L. Watson for Argument—Filed Nov. 8, 1935

Appeal from the District Court of the United States for the Western District of Pennsylvania

And now, to-wit: this 8th day of November, A. D. 1935, it is ordered that Hon. Albert L. Watson, District Judge for the Middle District of Pennsylvania, and Hon. —— ——,

District Judge for the —— District of ——, be, and he is hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

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[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY

And afterwards, to wit, the 8th day of November, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and Honorable Albert L. Watson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 6th day of October, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 38] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5938

THERESA M. GATTI, IN HER OWN RIGHT AND AS GUARDIAN OF THE ESTATE OF YOLANDA J. GATTI, Respondent-Appellant,

v.

NEW YORK LIFE INSURANCE COMPANY, Complainant-Appellee

OCTOBER TERM, 1935

No. 5939

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, Respondents-Appellants,

v.

NEW YORK LIFE INSURANCE COMPANY, Complainant-Appellee

Appeals from the District Court of the United States for the Western District of Pennsylvania

OPINION—Filed October 6, 1936

[fol. 39] Before Davis and Thompson, Circuit Judges, and Watson, District Judge

DAVIS, Circuit Judge.

Both cases in these appeals from the District Court involve identical questions of law.

On September 9, 1926, the New York Life Insurance Company insured the life of Yolanda J. Gatti, a citizen of Pennsylvania, for $5,000. In addition to insuring the life of Gatti, the policy contained a clause granting certain benefits in the event she became totally disabled.

She later suffered from dementia praecox, or a manic depressive psychosis, and applied for the benefits under the total disability clause. The Insurance Company paid $1,850 thereunder to the insured, or her guardian, Theresa Gatti. On November 20, 1934, after some investigation, it notified her and Theresa Gatti, that it had elected to rescind those parts of the contract of insurance which covered benefits for total disability and double indemnity, alleging that the

insured had made certain false and fraudulent misrepresentations in the application for the insurance, and tendered the amount of the premiums paid under those clauses. They refused the tender and instituted proceedings against the Insurance Company to collect further payments, which they claimed to be due, of the total disability benefits, in the Common Pleas Court of Jefferson County, Pennsylvania.

On December 1, 1928, the Insurance Company issued two like policies of insurance on the life of John G. Ruhlin, a citizen of Pennsylvania, one policy for $10,000, and the second for $5,000. On July 7, 1930, it issued three more similar policies on the life of Ruhlin, each for the face value of $4,000. All of these policies contained clauses granting [fol. 40] total disability and double indemnity benefits. On November 1, 1934, Ruhlin presented a claim for benefits for total disability. The Insurance Company refused this application, notified him that it had elected to rescind the policies in so far as they granted disability and double indemnity benefits on the ground of fraud, and tendered the amount of the premiums up to that time paid. The appellant refused the tender and also instituted suit in the Common Pleas Court of Jefferson County, Pennsylvania, to collect the benefits which he claimed to be due him under the policy.

On January 9, 1935, the Insurance Company filed a bill of complaint against Yolanda and Theresa Gatti, and on February 14, 1935, it filed a similar bill against John G. Ruhlin and the beneficiaries named in the policies. The bills contain several questions and answers made in the medical examination in connection with the applications for insurance; allege these answers to be false and fraudulent; set forth certain allegations of fact indicating wherein the answers were false and fraudulent; pray that the provisions in the policies relating to total disability and double indemnity benefits be rescinded; and that the defendants be enjoined from instituting or prosecuting any action under these provisions.

The District Court entered decrees granting preliminary injunctions and from these decrees the defendants appealed.

All the policies involved contain the following "incontestability" clause:

"This policy shall be incontestable after two years from its date of issue except for the nonpayment of premiums,

and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The first question raised by these appeals is whether or [fol. 41] not the Insurance Company has the right, after expiration of two years from the date of the policies, to rescind the provision for double indemnity and disability benefits because of fraud practiced in procuring the insurance.

This question has never to our knowledge been decided by the United States Supreme Court, and the state and federal courts which have passed upon it are not in accord.

The United States Circuit Court of Appeals for the Fifth Circuit in the case of Pyramid Life Insurance Co. v. Selkirk, 80 Fed. (2d) 553, held that the insurer had the right to rescind for fraud the provisions relating to disability and double indemnity benefits in a contract of insurance containing an incontestability clause substantially the same as the one in the case at bar.

The United States District Court for the Western District of Pennsylvania in the case of New York Life Insurance Company v. Davis, 5 Fed. Sup. 516 reached the same conclusion. So have the state courts in the states of New York, Connecticut, Pennsylvania, Maryland, Mississippi, Arizona, Washington and Tennessee.

We are concerned here with the "provisions and conditions" relating to disability. Leaving out the parts not material here, the excepting clause reads: "This policy shall be incontestable after two years from its date of issue * * * except as to provisions and conditions relating to disability benefits". It was clearly the purpose of the Insurance Company to except the provisions creating the obligation to pay these benefits from the incontestable provisions obligating it to pay insurance on the life of the insured. The policy clearly sets out the provisions and conditions relating to disability benefits and in definite and comprehensive language the excepting clause excludes these from the incontestability provisions.

[fol. 42] But the United States Circuit Court of Appeals for the Fourth Circuit in the cases of Ness v. Mutual Life Insurance Company of New York, 70 Fed. (2d) 59 and New York Life Insurance Company v. Truesdale, 79 Fed. (2d) 481, and the Circuit Court of Appeals for the Ninth Circuit in the cases of Mutual Life Insurance Co. of New York v. Markowitz, 78 Fed. (2d) 396 and New York Life In-

surance Company v. Kaufman, 78 Fed. (2d) 398 together with one or two state courts have reached a contrary conclusion. They hold that the exception in the incontestability clause applies to the "*provisions and conditions*" relating to disability and double indemnity benefits and not to the benefits themselves. For this reason, they say, the insurance company may not defend against a claim for disability benefits on the ground of fraud practiced in the procurement of the insurance if the period of limitation has expired.

We think this construction is untenable for two reasons: 1. The company may always, without an exception in the incontestability clause, contest the question as to whether or not a particular claim is covered by the policy. The question is purely one of coverage. That is, whether or not the insured has complied with the particular provisions or conditions entitling him to benefits. Metropolitan Life Assurance Co. v. Conway, 252 N. Y. 449; Smith v. Equitable Life Assurance Society, 89 S. W. (2d) (Tenn.) 165. 2. The exception here does not intend to distinguish between the "provisions and conditions" relating to benefits and the benefits themselves. These terms, "provisions and conditions", are comprehensive of the subject to which they relate. Smith v. Equitable Life Assurance Society, supra. The expression "provisions and conditions relating to disability benefits" even if tautological, embraces all matters [fol. 43] relating to liability for such benefits. When these terms are combined nothing else relating to liability for disability benefits remains for consideration. Both are excepted from the operation of the incontestability clause. Pyramid Life Insurance Co. v. Selkirk, supra. The language is clear and definite and the parties perfectly well understood it or with ordinary intelligence should have understood it. The exception is stated in such language as not to permit a person deliberately to misrepresent the facts and practice fraud on the company for his personal advantage and then hide behind a refined construction of the language employed.

The final question involved in these cases is whether or not the District Court erred in enjoining the prosecution of the cases in the State Court under these policies in view of the fact that in each case the insured had instituted proceedings in the State Court prior to the time when the appellee filed the bills of complaint for cancellation.

The appellants rely upon section 265 of the Judicial Code (28 U. S. C. A. section 379) which reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by law relating to proceedings in bankruptcy."

Where there is a conflict of jurisdiction between state and federal courts, there are two rules of law, the application of which depends upon whether the suit is in personam or in rem. Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state and federal court may proceed with the litigation, at least, until [fol. 44] judgment is obtained in one court and this may be set up as res judicata in the other court. Ward v. Foulkrod, 264 Fed. 627; Buck v. Colbath, 70 U. S. 334, 340; Kline v. Burke Construction Co., 260 U. S. 226; Penn Co. v. Pennsylvania, 294 U. S. 189, 195. But if the two suits are in rem, requiring that the court have possession or control of the res, which is the subject of the suit, in order to proceed with the cause and grant relief, the court first acquiring jurisdiction over the property may maintain and exercise it to the exclusion of the other to the end of the suit. Ward v. Foulkrod, supra; Penn Co. v. Pennsylvania, supra.

These cases were proceedings purely in personam and were instituted first in the State Court. They could have proceeded in both the state and federal courts at the same time and in whichever court judgment was first obtained, this could have been set up as res judicata in the other court. In such a situation the federal court has no right to restrain action in the State Court.

But it is urged that there are exceptions to the above rules, one of which is that the remedy at law afforded by the State Court is inadequate for the reason that the judgment secured there would not be binding upon the beneficiaries named in the policies or that the issue might be disposed of upon some ground other than the fraud set up in the case in equity in the federal court.

The Insurance Company could have defended the action at law in the State Court on the ground of fraud prac-

ticed in procuring the policy. Enelow v. New York Life Insurance Company, 293 U. S. 379. In that suit it could have called all its witnesses to establish the fraud. If the beneficiaries should ever bring suit against the company on the policies, it could call the same witnesses to testify again and if they had died in the meantime their previous testimony could be used.

[fol. 45] As to the disposition of the cases on some other ground than fraud, this apprehension could be avoided by requesting special verdicts so that the question of fraud could be determined.

The Insurance Company had a complete remedy at law against liability for disability benefits and should have pursued it in the State Court. Enelow v. New York Life Insurance Co. supra. The principles and considerations which should control a federal court of equity in refusing to assume jurisdiction over the statutory administration of corporate assets by state officers were recently stated and discussed by Mr. Justice Stone in the cases of Pennsylvania v. Williams, 294 U. S. 176; Penn Co. v. Pennsylvania, 294 U. S. 189; Gordon v. Washington, 295 U. S. 30. The reasoning and logic in those cases seem applicable here.

The District Court had jurisdiction to sustain a suit for the cancellation of the provision for double indemnity, which was not involved in the cases in the State Court, but the reasoning in the above cases raises a serious question as to whether or not, under the circumstances of the cases at bar, it should have exercised its right of jurisdiction. No court, however, has gone so far as to deny jurisdiction under similar circumstances. Accordingly it may proceed to hear the cases for cancellation of the policies in so far as they provide for double indemnity benefits, but not as to disability benefits, the liability for which the Insurance Company has a complete remedy at law in the State Court.

That part of the decrees of the District Court, in which it refused to dismiss the bills of complaint in so far as they seek the cancellation of the provisions of the policies for double indemnity benefits, is affirmed, but the remaining parts of the decrees are reversed with directions to dismiss [fol. 46] the bills in so far as they seek the cancellation of the provisions of the policies for disability benefits, and to

vacate the order restraining the appellants from prosecuting the actions brought by them in the State Court.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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[fol. 47] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5939

John G. Ruhlin et al., Appellants,

vs.

New York Life Insurance Co., Appellee

Judgment—Filed October 6, 1936

Appeal from the District Court of the United States, for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed as to that part of said decree which refused to dismiss the bill of complaint in so far as it seeks the cancellation of the provisions of the policy for double indemnity; but reversed, with costs, as to the remaining parts of said decree, with directions to the said District Court to dismiss the bill in so far as it seeks the cancellation of the provisions of the policy for disability benefits, and to vacate the order restraining appellants from prosecuting the action brought by them in the State Court.

J. Warren Davis, Circuit Judge.

Philadelphia, October 6, 1936.

[File endorsement omitted.]

[fol. 48] [File endorsement omitted]

[fol. 48-1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed October 31, 1936

To the Honorable, the Judges of said Court:

Your petitioner, the New York Life Insurance Company, the appellee in the above entitled case, respectfully prays a rehearing of the appeal on the question whether equity has jurisdiction to rescind the disability provisions of the policies of insurance involved in this litigation. The reasons for this petition follow.

The action at law brought by the insured alone, and to which the beneficiaries are not parties, we respectfully submit, does not afford a plain, adequate and complete [fol. 48-2] remedy at law. If the proposition just stated is correct, then it clearly follows that equity has jurisdiction and that the equity court should restrain the further prosecution of the action at law. It is entirely immaterial that the action at law may be in a state court and the suit in equity in a federal court. As said by Judge Parker for the Circuit Court of Appeals for the Fourth Circuit in Brown v. Pacific Mut. Life Ins. Co., 62 F. (2d) 711, 713, the real question in such a case as this is not one of conflict between state and federal jurisdictions, but concerns the respective jurisdictions of law and equity.

The first reason set forth in the appellee's original brief in this case (pp. 8-22), to show that the action at law brought by John G. Ruhlin alone in the state court does not furnish an adequate remedy to the appellee, is that a judgment favorable to the company in that law action would not be res adjudicata of a claim presented by the beneficiaries if the insured had died or become insane. In its opinion in this case filed on October 6, 1936, this Court does not disagree with the proposition that a judgment in the law action for disability benefits would not be res adjudicata against the beneficiaries. Instead, this Court said (p. 7):

"If the beneficiaries should ever bring suit against the company on the policies, it could call the same witnesses to

testify again and if they had died in the meantime their previous testimony could be used."

With all due deference for the learning and ability of this Court, it is respectfully submitted that the above quoted [fol. 48-3] reasoning is incorrect. In the first place, we submit that if the witnesses to prove that the insurance had been obtained by fraud, had died before the beneficiaries brought an action upon the policies, their previous testimony in the action brought by the insured alone, and to which the beneficiaries were not parties, could not be used. The beneficiaries, it should be remembered, are not parties to the action at law already brought by John G. Ruhlin alone (R. 9-10). Nor is there any such privity existing between the insured and the beneficiary in a life insurance policy as would result in the beneficiary being bound by testimony in a suit to which the beneficiary was not a party. The cases cited in the appellee's original brief in this case (pp. 8-19), for the conclusion that the judgment in a case to which the beneficiaries were not parties would not be res adjudicata against them, also support the proposition that the rights of the beneficiaries could not be prejudiced by the testimony of third persons in a suit to which the beneficiaries were not parties. It is well established that testimony in one case cannot be admitted in another case against persons who were neither parties to the prior suit nor in privity with a party to such earlier suit: Fresh v. Gilson, 16 Pet. 327, 331-332; Rutherford v. Geddes, 4 Wall. 220, 224; Tappan v. Beardsley, 10 Wall. 427, 434-435; Rumford Chemical Works v. Hygienic Chemical Co., 215 U. S. 156, 159-160; McCully v. Barr, 17 S. & R. 445, 450-451; Norris v. Monen, 3 Watts 465, 470.

[fol. 48-4] In the second place, even if the witnesses to prove the fraud were still alive and available when the beneficiaries brought suit, so that the insurer "could call the same witnesses to testify again," nevertheless a multiplicity of suits would result. There would be at least two actions at law: one by the insured, and the other by the beneficiaries, both involving the same question. In equity, on the contrary, a single suit will adjudicate the rights of all parties. The avoidance of a multiplicity of suits is of itself a recognized basis for equity jurisdiction: Oelrichs v. Spain, 15 Wall. 211, 228; Donovan v. Penna. Co., 199 U. S. 279, 305; Mutual Life Ins. Co. v. Blair, 130 Fed. 971, 977; 1 Pomeroy's

Equity Jurisprudence (4th ed.) § 243 et seq.; Simkins Federal Practice § 381.

Furthermore, even if the witnesses by whom the fraud could now be proved are still alive, and their whereabouts known, when in the perhaps distant future the beneficiaries bring suit upon the policies, it may be that the passage of years will have resulted in those witnesses having lost their records and recollection of the material facts. The evidence to prove that a fraud was committed in the obtaining of life insurance consists chiefly of the testimony of doctors that they treated the insured for a material illness before the insurance was applied for. The question of dates is vital—whether the illness and treatments occurred before or after the application for the insurance. But dates are difficult to remember. It is very likely, therefore, that before the beneficiaries can bring suit on a policy on the life of a living [fol. 48-5] person, the lapse of time will so have dimmed the memories of the doctors and other witnesses that to prove the fraud then will be impossible. This consideration is also sufficient to give equity jurisdiction (see authorities cited in the appellee's original brief in this case, p. 17).

This Court in its opinion filed on October 6, 1936, next said (p. 8) that any apprehension over disposition of the action at law brought by the *in*insured alone on some other ground than fraud "could be avoided by requesting special verdicts." The action at law in this case, as well as in the companion case of Gatti v. New York Life Ins. Co. (No. 5938), is pending in a state court of Pennsylvania. In Pennsylvania a litigant does not have an absolute right to a special verdict. Whether the jury shall be asked to return a special verdict lies "wholly within the discretion of the trial judge": Duffy v. York Haven W. & P. Co., 242 Pa. 146, 152. And even though the trial judge requests the jury to return a special verdict, the jury may ignore the request; the jury cannot be compelled to return a special verdict: Chambers v. Davis, 3 Whart. 40, 47; Patterson v. Kountz, 63 Pa. 246, 252; Culver v. Lehigh Valley Transit Co., 322 Pa. 503, 510-511. To the same effect, see 6 Standard Pa. Practice, § 67 (pp. 223-224). There is doubt, therefore, whether a decision upon the question of fraud in the procurement of the insurance could be obtained in the action at law brought by the insured alone for disability benefits. "It is a settled principle of equity jurisprudence that,

if the remedy at law be doubtful, a court of equity will not [fol. 48–6] decline cognizance of the suit. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law": Davis v. Wakelee, 156 U. S. 680, 688; Union Pac. R. R. Co. v. Weld Co., 247 U. S. 282, 285-286. This principle was specifically applied to a suit by an insurer to rescind a life insurance policy because of fraud in the application by the Circuit Court of Appeals for the Eighth Circuit in Lincoln Nat. Life Ins. Co. v. Hammer, 41 F. (2d) 12, 16. This principle was also invoked in Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 296.

For the conclusion that the appellee had a complete remedy at law against liability for disability benefits in the action of assumpsit brought by John G. Ruhlin alone in the state court, this Court cited Enelow v. New York Life Ins. Co., 293 U. S. 379. That case, however, is decisively different from the instant one. There the insured was dead; here he is still alive (R. 9). The action in the Enelow case was brought by the beneficiary to recover on the ordinary life feature of the policy. Mrs. Enelow, the plaintiff in that case, was therefore the only party who had any possible interest in the insurance and the only one who had or could have any claim under the policy. In the case at bar, on the contrary, the beneficiaries are not parties to the action at law (R. 9-10). The insured, John G. Ruhlin, the only plaintiff in the action at law in Jefferson County, is not the only person who has an interest in the policies in controversy nor the only one who may have a claim under said policies. The beneficiaries designated in the policies have an interest [fol. 48–7] therein and may have claims for disability benefits or double indemnity thereunder (R. 13, 17-18). If the action at law brought by Mrs. Enelow terminated in favor of the company, there clearly could be no subsequent suit; the company's liability under the policy would have been adjudicated once and forever. In the case at bar, however, no similar conclusive end would be put to the question of liability of the company under the policies by a decision in the action at law brought by the insured alone for disability benefits. Though that action at law were terminated in favor of the insurer, and a special verdict rendered finding that the insurance had been obtained by fraud, another suit could subsequently be brought by the beneficiaries for dou-

ble indemnity or disability benefits. In that subsequent suit, as has already been shown, the judgment in the action at law to which the beneficiaries were not parties could not be invoked under the doctrine of res adjudicata. The Enelow case, therefore, it is respectfully submitted, does not rule the one at bar. Indeed, the learned counsel for the petitioner in the Enelow case conceded in his brief filed with the Supreme Court that equity had jurisdiction to entertain a bill filed by an insurer to cancel a policy if the insured alone had brought an action at law for disability benefits. The following is quoted from the "Petitioner's Brief" in the Enelow case (p. 20):

"And even if a suit to recover on a policy was brought within the contestable period, *if all of the parties having an interest in the policy were not included as plaintiffs,* a [fol. 48–8] judgment that the policy was obtained by fraud would not be binding against the absent parties. Insurance companies were, therefore, permitted in such exceptional cases to maintain bills to cancel policies, notwithstanding the institution of the prior action at law against them."

The cases of Pennsylvania v. Williams, 294 U. S. 176; Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, and Gordon v. Washington, 295 U. S. 30, cited in the opinion of this Court, are very different from the case at bar. Those cases involved the liquidation of insolvent building and loan, insurance and banking corporations. In those cases it was held that the federal equity court had jurisdiction, but that as a matter of sound discretion the federal court should have permitted liquidation of the insolvent corporations' assets under the specialized and detailed machinery set up for that precise purpose by the Pennsylvania legislature. There is nothing in any of those cases which even intimates that equity does not have jurisdiction in a situation such as is presented by the case at bar.

"It is not enough, that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity." Boyce v. Grundy, 3 Pet. 210, 215.

In the case at bar the action at law brought by John G. Ruhlin alone for disability benefits in the state court does

not afford a remedy that is plain or adequate or as practical and efficient or as prompt as the remedy in equity. The [fol. 48–9] bill filed by the appellee should, therefore, be retained in so far as it seeks cancellation of the provisions of the policies for disability benefits, as well as in so far as it seeks cancellation of the provisions for double indemnity benefits. To this end, a rehearing is respectfully prayed.

Respectfully submitted, William H. Eckert, Smith, Buchanan, Scott & Gordon, Attorneys for Petitioner.

I hereby certify the foregoing petition has been prepared at the request of the New York Life Insurance Company, the appellee herein, and that I believe it to be well founded in law and fact, and that it is not interposed for the purpose of delay.

William H. Eckert, Of Counsel.

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[fol. 49] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order Granting Reargument in Part—Filed February 1, 1937

This case is here on petition for re-argument. The petition is denied as to the question of whether or not the insurance company had the right, after the expiration of two years from the date of the policy, to rescind the provision for double indemnity and disability benefits because of fraud practiced in procuring the insurance; but it is allowed as to the question of whether or not the District Court erred in enjoining the prosecution of the case in the State Court under the circumstances.

J. Warren Davis, Circuit Judge.

February 1, 1937.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MOTION FOR REARGUMENT AND RE-CONSIDERATION OF THE OPINION AND DECISION OF THE COURT FILED OCTOBER 6, 1936—Filed March 30, 1937

Whereas, we understand that the same questions involved in the appeal in this case are also involved in the case of Mutual Life Insurance Company of New York v. Stroehmann, on which latter case the certiorari was allowed, and the same was argued before the Supreme Court of the United States; and

Whereas, the Supreme Court of the United States, on March 29, 1937, handed down its Opinion and decision sustaining, as we understand, the position and contention of the appellants in this case;

Now, March 30, 1937, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin, and Jean L. Ruhlin, Appellants, by their Counsel, John E. Evans, Sr., respect-[fol. 51] fully moves the Court for a re-argument and re-consideration of the decision of the Court in the above-stated case, filed on October 6, 1936, to the end that justice may be done between the parties to this suit.

John E. Evans, Sr., Attorney for the Appellants.

[File endorsement omitted.]

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[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY

And afterwards, to wit, the 30th day of March, 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in

the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 27th day of September, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1937

No. 5939

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, Appellants,

v.

NEW YORK LIFE INSURANCE COMPANY, Appellee

Appeal from the United States District Court for the Western District of Pennsylvania

OPINION ON REARGUMENT—Filed September 27, 1937

Before Buffington, Davis and Thompson, Circuit Judges.

DAVIS, Circuit Judge:

This case is before us on reargument.

This is a suit by the appellee to rescind the double indemnity and disability provisions in certain policies of life insurance issued by it to John G. Ruhlin, one of the appellants, because of fraud alleged to have been practised by him in procuring the insurance, and to enjoin him from prosecuting a suit previously commenced by him in a state court to collect the disability benefits.

[fol. 54] The questions in issue are whether or not the company is barred from rescinding these provisions because of the "incontestability" clause contained in each of the policies and whether or not the insured should be enjoined from prosecuting the suit in the state court. This clause reads as follows:

"This policy shall be incontestable after two years from its date of issue except for the non-payment of premiums, and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

In our former opinion, filed October 6, 1936, disposing of this case and also the case of Gatti v. New York Life Insurance Company, which involved the same questions as are here in issue, we held that the company was not barred by the incontestability clause from rescinding the Disability and Double Indemnity provisions, though the action was commenced more than two years after the policy was issued and that the District Court erred in enjoining the prosecution of the suit in the state court.

In the recent decision in the case of Stroehmann et al. v. Mutual Life Ins. Co. of New York, 300 U. S. 435, the Supreme Court held that the incontestability clause there involved did bar an action to rescind the double indemnity and disability provisions after the period of contestability had passed because it was ambiguous. The clause in that case read as follows:

"Incontestability. Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

[fol. 55] In its opinion the Supreme Court said:

"The Circuit Court of Appeals followed its earlier opinion in New York Life Ins. Co. v. Gatti (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make exceptions to the incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

"Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt."

The "language" employed in the incontestability clause here involved is the same as that used in the Gatti case, but, as the Supreme Court pointed out, differs from that used in the Stroehmann case. The language used in the clause here in question is "more precise" than that em-

ployed in the Stroehmann case and "expresses in plain words the exception for which" the company now contends. Furthermore, both the Court of Appeals of New York and the Supreme Court of Pennsylvania have held that the incontestability clause here involved clearly excepts the double indemnity and disability provisions from its operation. Steinberg v. New York Life Ins. Co., 263 N. Y. 45, 188 N. E. 15; Manhattan Life Insurance Co. v. Schwartz, 9 N. E. (2) 16; Grise v. New York Life Ins. Co., 191 Atl. 626. We have read the recent opinion of the Supreme Court of California in the case of Coodley v. New York Life Insurance Co., — Cal. —, and the opinion of Judge Coughlin in the case of New York Life Insurance Co. v. Thomas, 27 D. & C. 215, but are not persuaded that the learned District Judge erred. Since the company is domiciled in New York and the insured lives in Pennsylvania and "all that is here [fol. 56] for our consideration is the meaning, the tacit implications, of a particular set of words", "for the sake of harmony and to avoid confusion" we shall follow the decision of those courts and hold that the insurance company is not barred by the incontestability clause from rescinding the double indemnity and disability provisions. Mutual Life Ins. Co. v. Johnson, 293 U. S. 340; Trainor v. Ætna Casualty Company, 290 U. S. 47, 54.

The second question raised is whether or not the company was entitled to an order restraining the insured from further prosecuting his action in the state court to collect disability benefits.

The company contends that its remedy at law is inadequate and that the insured should therefore be enjoined from further prosecuting his suit in the state court, for the reasons that the insured could discontinue his action at law at any time, and refuse to bring another action on the policy until all opportunity to prove fraud against him had gone; that the suit in the state court might possibly end in a general verdict in its favor, which would not settle the issue of fraud for such verdict might be based alone on the issue of disability; and that even if the issue of fraud were decided in its favor, that would not bind the beneficiaries who are not parties to the action and might at some future time sue on the policies.

It is true that the company could defend at law in the state court on the ground of fraud (Enelow v. New York

Life Ins. Co., 293 U. S. 379; Adamos v. New York Life Ins. Co., 293 U. S. 386) but whether or not the trial judge would request the jury to return a special verdict on the issue of fraud, is within his discretion (Duffy et al. v. York Haven Water & Power Co., 242 Pa. 146, 88 Atl. 935) and if requested to return such verdict, the jury could and might refuse to do so. Culver et al. v. Lehigh Valley Transit Co., [fol. 57] 322 Pa. 503, 186 Atl. 70. If, however, the judge and jury did as requested, that would not cancel the policy which the company seeks to do in the suit in equity.

When the remedy at law is not plain, adequate and complete, an insurance company does not have to await the determination of the issue of fraud at law, but may proceed in equity for the cancellation of the policy. Where there is danger that witnesses may disappear, evidence be lost, or all the parties interested in the policy are not before the court in the suit at law, or where the adequacy of the remedy at law depends upon the will of the insured, or where the ends of justice will not be satisfied by a mere judgment for the defendant in the action at law, but would require some distinctively equitable relief, such as cancellation or reformation of the instrument sued upon, equity will enjoin the action at law and proceed to give full relief. American Life Insurance Co. v. Stewart, 300 U. S. 203; Brown et al. v. Pacific Mutual Life Insurance Co., 62 Fed. (2d) 711; New York Life Insurance Co. v. Halpern, 47 Fed. (2d) 935; New York Life Insurance Co. v. Davis, 5 Fed. Supp. 316; Pomeroy on Equity Jurisprudence (4th Ed.) Vol. 4, Ch. 1363. The case of American Life Insurance Co. v. Stewart, supra, disposes of practically every argument made in the case at bar, relating to the adequacy of the remedy at law, adversely to the contention of the appellants.

In the present case the remedy at law is inadequate for the insured might discontinue his suit in the state court and even if he did not, the beneficiaries, not being parties, would not be bound by any judgment there entered. In either case, before a new action was brought by the insured or before an action was brought to which the beneficiaries could be made parties, the insurance company's witnesses might die, disappear or forget the facts relevant to the [fol. 58] alleged fraud. Furthermore, a judgment in the state court would not effect a rescission of the provisions

involved and this affirmative relief is the object of the company's suit in equity.

It follows that the decree of the District Court must be affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1937

No. 5939

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, Appellants,

vs.

NEW YORK LIFE INSURANCE CO., Appellee

JUDGMENT—Filed September 27, 1937

Appeal from the District Court of the United States, for the Western District of Pennsylvania

Thus cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 27, 1937.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

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[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 3, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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